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No. 95-86

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In The

Supreme Court of the United States

October Term, 1995

DOOLIN SECURITY SAVINGS BANK, F.S.B.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Courts Of Appeals For The Fourth Circuit

BRIEF OF THE *AMICI CURIAE* WEST VIRGINIA BANKERS ASSOCIATION, WISCONSIN LEAGUE OF FINANCIAL INSTITUTIONS, LTD., AND BANK OF COUSHATTA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation's review procedures involving deposit insurance assessments violate due process rights.

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INTEREST OF THE AMICI CURIAE

The West Virginia Bankers Association("WVBA"), Wisconsin League of Financial Institutions, Ltd., ("WLFI") and Bank of Coushatta hereby respectfully submit this brief as *amici curiae* in support of the petitioner with the consent of the parties. The signed consents of each are filed together with this brief.

Amici are a small financial institution from a small, predominately rural, state and two (2) trade associations

representing FDIC-insured institutions. The WVBA represents the interests of approximately one hundred sixty-seven FDIC-insured institutions in West Virginia. The WLFI represents the interests of fifty-three (53) state and federally chartered FDIC-insured, savings and loans and savings banks maintaining their home offices in the State of Wisconsin. Bank of Coushatta is a small bank in rural Louisiana whose case, *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 170 (1991), was cited by the Fourth Circuit in affirming the termination by the Federal Deposit Insurance Corporation ("FDIC") of Doolin's federal deposit insurance. *Amici* believe that the FDIC's procedures for review of deposit insurance risk classification violate Doolin's due process rights.

The WVBA and WLFI assert that the ability of their members to protect themselves from arbitrary or erroneous risk classifications turns upon the review process available in the event of disagreement with the FDIC. Presently, there exists no means by which an FDIC-insured depository institution may challenge its risk classification *and* create a meaningful record of both the FDIC's basis for the classification and the institution's basis for challenge. Absent an effective administrative procedure to do so, subsequent reviews become meaningless, especially in view of the deference given the FDIC's interpretation in any judicial review.

SUMMARY OF ARGUMENT

As the Fourth Circuit Court of Appeals recognized, Doolin's challenges to the FDIC procedures by which an

institution seeks review of its assessment classification are fundamental to its case since the termination of insurance proceeding stems directly from Doolin's concerns regarding the risk classification.[1] The Fourth Circuit Court of Appeals reviewed the informal administrative review process through which an insured institution can challenge its risk classification. The process is informal, discretionary, and written.

In summary, the procedure available to an insured institution disputing its risk classification is to submit a written objection to the classification, including basis for the institution's belief that the assessment should be changed.[2]

This written submission must be made by the institution without the benefit of an opportunity to discover the FDIC's analysis and application of the variety of factors the FDIC considers in setting the classification.[3]

REASONS FOR GRANTING THE WRIT

The FDIC's sole obligation is to accept the additional information and then notify the institution as to whether the submission, made in a vacuum of knowledge, causes the FDIC to reconsider its risk assessment. If the FDIC does not elect to reconsider the original classification, the

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[1] *Doolin Security Savings Bank, F.S.B. v. Federal Deposit Insurance Corporation*, 53 F.3d 1395 (4th Cir. 1995), at 1401.

[2] 12 C.F.R. § 327.4(d).

[3] The FDIC considers a variety of factors in determining the risk classification. 12 C.F.R. 327.3(e).

original determination stands. The FDIC does not provide a reasoned opinion for a rejection of the request for reconsideration. The institution is left to seek judicial review of the final decision of the FDIC under the Administrative Procedure Act. At this juncture, judicial review is virtually meaningless as no opportunity exists in the administrative process for the institution to create a meaningful record for consideration by the court.

Accordingly, the FDIC informal procedure violates an institution's due process right by failing to provide a meaningful process. As the Fourth Circuit Court of Appeals noted in its opinion, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[4]

The Fourth Circuit analyzed the due process requirements in *Mathews* and applied them to the Doolin case. The three factor test developed by *Mathews* is:

> [I]dentification of this specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Governments' interest including the function involved and the fiscal and administrative burdens that

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[4] *Doolin, supra,* at 1402, quoting *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), (quoting *Armstrong v. Manso,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).)

the additional or substitute procedural requirement would entail.[5]

The application of the three factor test to the procedural review of FDIC risk classification reveals that the informal FDIC procedure does not meet the standard of due process.

With regard to the first aspect of the test, that a private interest exists, the Fourth Circuit Court of Appeals found "Doolin's interest in its risk classification is significant because the classification affects its depository insurance assessment rate."[6] This conclusion applies equally to all depository institutions.

Next, the Fourth Circuit Court of Appeals concluded that the risk of an erroneous deprivation is minimal. The Fourth Circuit opinion provides no basis for this other than the requirement that the FDIC's risk classification be based upon a detailed evaluation of the institution. Such a basis was assumed by the Court for Doolin had no opportunity to demonstrate otherwise and the FDIC's decision did not address the issue. The *Amici* dispute that an accurate and detailed evaluation will in fact occur in each instance. Accordingly, the *Amici* dispute the conclusion that the FDIC's procedure is such that the risk of erroneous deprivation is minimal. Significantly, the FDIC's procedures do not permit an institution to develop these facts so that they may be, if necessary, ultimately reviewed by a Court. Accordingly, the *Amici* assert that additional procedural safeguards *are* necessary to assure

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[5] *Mathews, supra,* at 335, 96 S.Ct. at 903.

[6] *Doolin, supra,* at 1403.

that due process is achieved. In *Mathews*, this Court emphasized the fact that the agency in question allowed access to all information relied upon by the agency and the agency supplied a summary of the evidence it considered most relevant. The recipient then had a *meaningful* opportunity to submit challenging evidence or arguments.[7] These circumstances do not exist in the present case. The FDIC procedure to challenge risk classification requires submission of a response to the classification, without the benefit of knowing the details of the FDIC's basis for that classification.

The third element of the test set forth in *Mathews* addresses the Government's interest. Clearly, the Government has an interest in an accurate and efficient administration of the Federal Deposit Insurance funds. The FDIC's assessment of insurance premiums is clearly essential to that interest. However, the FDIC is not only the administrator of the deposit insurance funds, it is also a regulator of depository institutions. As such, it also has an interest in the day-to-day regulation and supervision of the depository institution. Accordingly, the FDIC also has a balancing interest in assuring the accuracy of the insurance risk classifications from the perspective of the overall impact on an institution, as opposed to the impact of the assessment on the insurance fund. Balancing these interests, the FDIC should afford additional, meaningful procedural opportunities for an institution challenging a risk classification to learn specific basis of that classification and to offer evidence supporting its assertion that the classification is incorrect.

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[7] *Mathews, supra*, at 346.

As indicated above, a challenge to the risk assessment classification involves procedural issues of concern to all FDIC insured depository institutions. The *Amici* believe that the Fourth Circuit Court of Appeal's conclusion in its application of the *Mathews* due process test was erroneous and that the informal FDIC review procedure denies due process to institutions seeking to challenge the risk classification. Such institutions are denied a meaningful opportunity at a meaningful time to seek reconsideration of the risk classification. By the time their objection would reach a court, the review would not be meaningful due to a lack of a record and due to the deference to which the regulator would be *per se* entitled at that point.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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